Supreme Court of the United States.

OCTOBER TERM, 1904.

Ex parte GERTRUDE GLASER, as Administratrix of the Goods, Chattels and Credits of ISADOR GLASER, deceased.	No. 16 Original.

Additional Brief of Petitioner.

Petitioner respectfully submits this additional brief to supplement the brief filed by petitioner with her petition, to which said first filed brief the petitioner begs again to call the Court's attention and request that it be first read by the Court in passing finally upon this motion.

Petitioner submits that no new facts are before the Court by reason of the return herein. The return is only the first four pages of the printed matter submitted in opposition to this motion. This return says (page 29):

> "That his (Judge Thomas's) reasons for denying the motion referred to in the petition are set forth in the order made thereon and which reads as follows:"

Then follows the order at length, the only reason set forth in it for denying the motion being "upon the sole ground that no action of Gertrude Glaser, as administratrix of the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P. Langer, is nor ever has been pending in this Court," that is, in the Circuit Court of the United States for the Eastern District of New York.

This does not traverse or deny any allegation of the petitioner.

The affidavits following the four pages of the return will not be considered by the Supreme Court except in so far as they are a verification of the return; they are not signed by the Judges or any of them; they do not purport to be a return but a verification by Cass (p. 12) for Langer, the defendant in said Circuit Court action. Said Cass evidently is acting therein for the defendant Langer and not for the Court (see pp. 1 and 2, subdivisions 3 and 4; p. 12, subdivision 20). But Langer has no right to make a return, nor has Cass nor the Clerk of the Circuit Court, either for themselves or for Langer. The affidavits are not, in fact, a verification of anything in the return, which alleges nothing not already alleged by the petition.

2. The return of Judge Thomas is a nullity; (1) since it denies nothing in the petition, and (2) is not verified by Judge Thomas nor by any one of the Judges to whom the order is directed, nor is any reason given why it is not so verified. The reason Cass gives for making the verification (that his client Langer is ignorant) is not stated to apply (and does not, in fact, apply) to Judge Thomas—who, of course, knows all about the application before him and his reasons for denying it.

3. For fear, however, that petitioner may be wrong in thinking the Court will disregard these affidavits and since said affidavits are inaccurate, petitioner's attorney submits at the close of this brief an affidavit replying to said affidavits of Cass and Benedict, and submits the following points of law upon the issues (if any) raised by said affidavits and deponent's affidavit. Petitioner relies

also on her brief submitted on her *ex parte* application for the order to show cause and now on file with this Court, and petitioner hereby begs this Honorable Court again to consider said brief in deciding the present motion.

4. The service of the answer and notice of appearing, constitute an appearance in a State Court of record and must under Section 914 of the U. S. Revised Statute also constitute an appearance in the Circuit Court.

See second point of petitioner's first brief.

Amy v. Watertown, 130 U.S., 301, in construing Section 914, U. S. Revised Statute, says that in the construction of a State Statute in a matter purely domestic (as is service of process) the Court is disposed to follow the State decisions.

Section 914 of the United States Revised Statutes says:

> "*The practice, pleadings and forms and modes of proceeding in civil causes other than Equity and admiralty causes* in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, *any rule of Court to the contrary notwithstanding.*"

The sworn petition of petitioner has alleged that according to the practice of the State Courts of Record and State Statutes on the subject and the State decisions, the act of Langer in *serving* the notice of appearance and copy of the verified answer on the attorney for Glaser would constitute an appearance. This is not denied by the return nor even by the affidavits attached to the return and is expressly admitted in the affidavit of Cass, in sub-

division 11, by the admission that the State Court practice does not require the filing of pleadings or notice of appearance to render service effective.

The New York Code, Section 824, does say that pleadings must be filed, but the duty is imposed on the pleader and the only penalty for not doing so is also expressed in the same Section, namely, that the opposite party *may* have it filed.

Counsel for petitioner has made an exhaustive search for cases on the subject of whether acts constituting an appearance in a State Court of Record are held by the United States Courts to constitute an appearance in law actions in Circuit and District Courts, but is unable to find any bearing directly on it, either for or against the position taken by petitioner; but the position of petitioner is clearly authorized by said Section 914, and under the very terms of that Section any rule of the Circuit Court of the Eastern District of New York to the contrary would be of no consequence. By rule 70 of the Eastern District Circuit Court the State Statutes are expressly adopted. (See Irving's affidavit, Subdivision 7).

It is respectfully submitted, however that the rules as printed in the affidavit of Benedict in support of his statement that the complaint, answer or other appearance in an action must be filed do not in fact support his position. The Clerk, by Rule 8, is directed to enter the defendant's appearance. The one served on the petitioner's attorney was tendered to the said Clerk by petitioner's attorney (subd. 10), and he refused to file it. There is no question here of an amended pleading. But even had the rule required the filing of the notice of appearance and even had the plaintiff in the Circuit Court action neglected to file it, the mere omission of this act would not deprive the Court of jurisdiction since the present State law (made

applicable by Section 914 of the Revised Statutes and by the very rules themselves of the Eastern District Court) says that the *service* of the notice of appearance on the attorney constitutes an appearance.

There is no magic virtue in the mere act of filing a notice of appearance or answer. When in the hands of the attorney—as much an officer of the Court as is the clerk—they are as valid and binding (if there is intent to appear) as if they were actually filed.

Petitioner contends that Section 421 of the New York Code taken with Section 914 of the Revised Statutes makes of it no consequence what the rule of the Circuit Court may be in so far as that rule is opposed to the State statute, but if said rule is to govern it must be taken as of the time when it was adopted, to wit, about 1865. At that time and up to 1881, Section 421 of the New York Code was not enacted, the only Statute provision being (139 of the then New York Code, corresponding to Section 424 of the present Code), that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him. There was also however at that time a rule of the Supreme Court known as Rule 11, which provided:

> "Service of notice of appearance or retainer generally shall in all cases be deemed an appearance, and the plaintiff on filing such notice at any time thereafter with proof of service thereof may have the appearance of the defendant entered as of the time when said notice was served."

If the attorney for Langer refuses to be bound by the present State law (by which petitioner claims that he must be bound), he certainly must be bound by the State Rules, Statutes and practice in force at the time of the adoption of these Circuit Court Rules.

The following cases, most of them now overruled by Section 421 of the New York Code so far as New York practice is concerned, show the State practice in its Courts of Record at the time of the adoption of the Rules of the Circuit Court quoted by Mr. Benedict:

(a). Cases showing that appearance in the State Courts of Record is made by *service* of appearance or answer:

Reed v. Chilson, 142 New York 152, (not overruled).
Webb v. Mott, 6 Howard's Practice, 441.
Mulkins v. Clark, 3 Howard's Practice, 27.
Gardner v. Teller, 2 Howard's Practice, 241.
Hill v. Smith, 2 Howard's Practice, 242.
Roberts v. Willard, 1 New York Code Reporter, 101.
Legate v. Lagrille, 1 Howard's Practice, 15.

(b) Cases holding that appearance cures all defects in or even voidness or absence of process:

Cowenhoven v. Ball, 118 N. Y., 231 at 234 (not overruled).
Sprague v. Irwin, 27 Howard's Practice, 51 (defect).
Layton v. McConnell, 61 App. Div., 448 (not overruled).
Mulkins v. Clark, 3 Howard's Practice, 27 (defect).
Hill v. Smith, 2 Howard's Practice, 242 (void).
Legate v. Lagrille, 1 Howard's Practice 15 (void).
Seymour v. Judd, 2 New York, 464.
Smith v. Dipeer, 2 N. Y. Code Reporter, 70 (void or absent).
Paulding v. Hudson Co., 2 E. D. Smith (N. Y.) 38 (void).
Vernon v. Palmer, 48 Superior Ct., 229 at 235 (void).
Allen v. Malcolm, 12 Abbott N. S., 337 (void).
Wright v. Jeffry, 5 Cowen, 15 (defect).
Kelsey v. Covert, 15 Howard's Practice, 92.
Robinson v. West, 1 Sandford, 18 (void).

Ballouhey v. Cadat, 3 Abb. N. S., 122 (void).
Coppernoll v. Ketcham, 56 Barb., 111 (void)
Bissell v. Railroad Co., 67 Barb., 385 (affirmed 67 Barb., 393).
Prussia v. Guenther, 16 Abb. N. C., 237 (void).
Hewitt v. Howell, 8 How., 347 (void or absent).
Bank v. Powers, 43 App. Div., 178 (void).
Pixley v. Winchell, 7 Cow., 366 (defect or absence.
Dix v. Palmer, 5 How., 233 (voidness or absence).
Merkee v. Rochester, 13 How., 157 (defect or absence).

(c) Cases holding that an appearance of a defendant is valid and gives the Court jurisdiction and cures defects in voidness or absence of process, whether or not defendant at the time of appearing knows of the voidness or defect or absence of process and even though he thinks himself bound to appear.

Coppernoll v. Ketcham, 56 Barb., 111.
Legate v. Lagrille, 1 How., 15.
Wright v. Jeffry, 5 Cow., 15.
Reed v. Chilson, 142 N. Y., 152.
Olcott v. McLean, 73 N. Y., 223.
Woodruff v. Austin, 16 Misc., 543.
Bissell v. Railroad, 67 Barb., 385.
Pixley v. Winchell, 7 Cow., 366.
Phelps v. Phelps, 6 Civ. Pro., 119 (affirmed 42 Hun, 642).
Sprague v. Irwin, 27 How., 51.
Mulkins v. Clark, 3 How., 27.
Hill v. Smith, 2 How., 242.

(d) Cases holding that mere endorsement of papers by an attorney without restricting his appearance or objecting to the defect constitutes a general appearance:

Phelps v. Phelps, 6 Civ. Pro., 119.
Baxter v. Arnold, 9 How., 445.
Douglas v. Haberstro, 8 Abb. N. C., 230.
Kelsey v. Covert, 15 How., 92.
Ayers v. Railroad, 48 Barb., 132.

The attorney for the defendant, Carl Schurz Petrasch, signed himself as such attorney, without restriction, to the notice of appearance and answer served upon the plaintiff, and also to numerous papers submitted by him to the Circuit Court in opposing the application to compel the filing of the answer.

As far as the present New York practice is concerned, most of the foregoing cases have been overruled by Section 421 of the Code, so far as they are in conflict with that section. It is evident from them, however, that at the time of the adoption of the Circuit Court rules for the Eastern District of New York, the mere service on plaintiff's attorney of the notice of appearance and answer constituted a general appearance in the action whether or not the summons was void or non-existent—the same rule as is now established by Section 421 of the Code.

It is also evident from these cases that there is no merit in Langer's contention that his appearance was not voluntary, being induced only by his opinion that the summons was valid. In many of these cases, it is held that an appearance so induced is voluntary and valid to give the Court jurisdiction, though in some of them where the Court so held the defendant urged that his appearance was not voluntary inasmuch as it was compulsory.

The cases most closely resembling our case are cases (a number of which are cited above) where a summons only was served in an action for the collection of a penalty, which, under the New York Statutes (Section 1897 of the Code) is required to be endorsed with a distinct reference to the statute under which the penalty is imposed, the absence of which endorsement has been held to make the summons incurably void (*Brown v. Pond*, 5 *Fed.* 31; *U. S. v. Reilly*, 88 *Fed.* 480; *Lassen v. Aron-*

son, 21 *N. Y. Supp.*, 452; *Bank v. Stringer*, 75 *App. Div.*, 127). The Stringer case and *Delisser v. Railroad*, 59 *Super. Court*, 233; and *Crown Cotton Mills v. Turner*, 82 *Fed.*, 337, hold that a defendant in such a case *could* not know until the complaint was served what the cause of action was and therefore could not know when the summons was served that the summons was void. He is bound to appear, however, upon the receipt of the summons or have judgment by default taken against him. In each of these cases for enforcement of a penalty then, plaintiff's negligent act prevented defendant from knowing the fatal defect in the summons. The appearance served in such ignorance nevertheless was held to give jurisdiction. While in *Lassen v. Aronson*, 21 *N. Y. Suppl.*, 452, and the Stringer case cited above, permission was given to withdraw the appearance on discovery of the defect, there is no case which has permitted a withdrawal after the lapse of a year and after the Statute of Limitations has run. In the Stringer case the motion to withdraw the appearance was made without delay; the summons was served October 3rd, the complaint was served November 11th, and the notice of motion to withdraw the appearance was made November 23rd, 1901. This does not appear from the reported case, but may be seen in Volume 202, Number 190, Cases & Points of the Third Department, Bar Association Library. In *Lasson v. Aronson* it was also made promptly, as shown by deponent's affidavit, subdivision 8, *U. S. v. Reilly*, *supra*, an exactly similar case to our own, refused permission to withdraw appearance on account of laches of the defendant.

But, as said before, there is before this Court no question of withdrawal of the appearance, since no such application has ever been made.

4. By opposing the Circuit Court application on the ground of plaintiff's laches in making it, the defendant submitted to the jurisdiction of the Court.

(Jones v. Anderson, 10 Wallace, 327, which is numerously cited).

In the case just cited a defendant appeared and urged, first, that the Court had no jurisdiction, second that there was no equity in the plaintiff's case. The Court held that his second plea constituted an appearance, in spite of his claim that his appearance was special only.

In *Crawford v. Foster*, 84 *Fed.*, 941, where on a motion to revive a judgment, the defendant alleged that process was defective and claimed that he had appeared specially, but also urged that the judgment sought to be revived was void on its face and incapable of enforcement by execution, it was held that by so pleading to the merits of the application, the Court acquired jurdisdiction in spite of the claim of a special appearance.

5. If defendant has appeared there is no necessity for any process at all (See cases cited in orignal brief under first point).

In *Segee v. Thomas*, 3 *Blatchford*, 11, the Court said:

> "And if he (defendant) is not served anywhere with process of any kind and appears in the suit and submits to the jurisdiction of the Court, it is the same as if he had been regularly served with process. The object of process is to get the defendant into Court to answer and defend the suit, and his appearing to answer and defend without process is as binding upon him as if he appeared in the proceeding on process regularly served. In this case the subpœna was served upon the attorney of the defendant in Connecticut. That was the only service and the defendant has by appearing and answering the bill waived all other service."

6. If the Court thinks that plaintiff is not entitled as a matter of right to the relief asked and thinks further that it has any discretion in the matter, it is submitted that this case is one in which its discretion should be exercised in favor of plaintiff.

As shown by the motion papers, the plaintiff is a very poor woman who sues to recover damages resulting from the death of her husband.

If the motion is not granted, the Statute of Limitations has run and she will be without remedy. If the motion is granted, the only hardship imposed on the defendant will be the necessity of defending this action. If plaintiff's case is a just one, defendant should compensate her for her loss. If it is not a just one, defendant may establish this on the trial and so defeat the action.

7. The United States Supreme Court will not consider any question of laches before the application was made to the Circuit Court. That question was before that Court and was decided in favor of the plaintiff, the Court saying that the only ground of its action was the fact, as claimed by Judge Thomas, that no action was pending before him.

Respectfully submitted,
RICHARD A. IRVING,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

Ex parte GERTRUDE GLASER, as Administratrix of the goods, chattels and credits of ISADOR GLASER, deceased.	No. 16 Original.

State of New York, }
County of New York, } ss.:

RICHARD A. IRVING, being duly sworn, deposes and says in answer to the affidavits of Alvin C. Cass and B. L. Benedict attached to the return herein

1. Deponent claims that said affidavits are not a part of the return and should not be considered on this motion but deponent replies to them for fear this Court may deem them a part of the return and may be misled by them.

2. That the copy of the summons in the Circuit Court action served upon Anthony P. Langer contained no reference to a seal of the clerk on the original, thereby giving said Langer and his attorney notice of irregularity in the summons. (See subdivision 5 and 6, Cass's affidavit).

3. While the complaint and summons were not "on file" with the clerk of the Circuit Court and while one of the affidavits in support of the motion in the Circuit Court mistakenly stated that they were so on file, said summons and complaint were actually in the office of the said clerk and in the possession of said clerk (having been delivered to him

by the Marshal) from the time of the service by the Marshal on the 30th of December, 1902, up to the time when the mistake was discovered, a year afterward. Joseph C. Cochran, the deputy clerk, so testified in the deposition from which an extract is quoted by Cass (subdivision 16, Cass's affidavit) and it is otherwise undisputed. The only reason they were not filed was because the clerk refused to file them. They were evidently submitted for filing by the Marshal and also later by deponent.

4. Petitioner takes the position on this motion that it is immaterial whether the defect in the summons was known to the defendant Langer before he appeared or not, but since in the seventh subdivision of his affidavit, Cass has attempted to show that it was not known before said service, deponent submits the following to show that said Cass is probably mistaken:

(a) The deputy clerk Cochran in his deposition quoted by Cass states that the summons was given to him on the 29th day of December (it was actually the 30th, as shown by the Marshal's return and Cass's affidavit, subdivision 17, making the return day twenty days later, January 19th, 1903). He then says that shortly after, he took up the papers to enter them in the register and discovered the defect. That he then called up a telephone number which happened to be on the back of this complaint, but which was not the telephone number of Mr. Carr, the only attorney of record for the plaintiff, and informed of the defect someone who answered the telephone and who said he represented Mr. Carr. These are his exact words:

> "I might say I called up according to my recollection, the person whose name was on

the papers and scratched out on the cover attached to the summons and complaint because I do not think Mr. Carr's name was in the telephone book. I am not very certain. The person who answered the 'phone said he would look up the matter or words to that effect."

While his deposition does not state the date when he called up this person said Cochran afterwards stated to deponent that to the best of his (said Cochran's) recollection, the said telephone conversation occurred on the day the summons and complaint was given him by the Marshal (December 30th,) but that he would swear positively that it was within less than a week of the time of the delivery by the Marshal of the said summons and complaint to the clerk. In the aforesaid deposition, in answer to the question of Mr. Cass: "Do you remember my bringing the notice of appearance and answer to your office to be filed or do you remember that such papers were brought in this case?" he says, "To the best of my recollection some one did present these papers for filing; I do not know just who the person was—*about a week later.*" He also stated to deponent, though it did not appear on the deposition, that he did not recollect whether the papers offered him for filing consisted of both a notice of appearance and answer but that it might have been only a notice of appearance or a notice of appearance and answer or an answer only. All he recollected was that some paper or papers were offered him for filing.

By this evidence, which is undisputed, it would appear that the answer or notice of appearance of defendant was offered for filing and the defect discovered by defendant about two weeks after the summons was served. This would correspond very closely with the date of the notice of appearance,

which is admitted to have been served by defendant and which is dated January 14th, 1903, two weeks and a day after the complaint was served.

(b). Deponent also thinks that said Cass is mistaken for the reason that, as shown by the extract from deponent's former affidavit quoted in subdivision 17 of Cass's affidavit, said Cass stated to deponent not earlier than 4:30 in the afternoon of the twentieth day after the service of the complaint (being the last day to answer) that he *could* not serve his answer that day. It also appears from said affidavit of deponent that the clerk's office of the said Circuit Court closes at 5 P. M. Said Cass swears in the affidavit verified by him on the 4th of April, 1904, and used on the said motion:

> "To the best of my recollection, I took the answer with the notice of appearance for filing to the clerk's office on the day on which the answer was served. I am unable to recall the date, but do remember the particulars of the service of the answer for these reasons: I personally attempted to obtain an extension of time to plead and to that end saw Richard A. Irving, one of the plaintiff's present counsel * * * I remember making special efforts and obtaining the defendant to come to come to New York and having the answer served within the time without returning to said Irving for an extension."

Said Cass also swears in said affidavit that he is sure said service was made *before* the expiration of said twenty days.

Deponent in said former affidavit submitted to the Circuit Court swears that the residence of the defendant in Williamsburgh was at least thirty minutes from the office at that time of his attorney.

The office of defendant's attorney was at least twenty minutes from the said Circuit Court Clerk's office. The postmark on the envelope in which the answer was served on the twentieth day was stated on said motion to have been lost, but deponent swore that to the best of deponent's recollection, the postmark showed that the mailing was about the hour of ten o'clock in the evening of January 19th, 1903. The answer itself shows that it was sworn to on the day on which it was served, January 19th, 1903.

From the foregoing, it appears that at 4:30 in the afternoon of January 19th, 1902, the defendant's answer was presumably not ready to be served, since his attorney stated that he *could not* serve it on that day; that immediately thereafter he communicated with his client in Williamsburgh and made him come to New York, which at best (supposing his client to have been reached at once by telephone) could not have been done in less than thirty minutes. The clerk's office closed at five o'clock and it would have taken twenty minutes for the attorney to have reached the said clerk's office after having his answer prepared and signed by his client, making it impossible under the most favorable circumstances for said Cass to have tendered said answer to the clerk for filing *after* the service of said answer. In other words, it is undisputed that the answer was served after 4:30 on the last day to serve it. On the other undisputed facts as to time and distance it would have been impossible for said Cass to have gotten to said clerk's office on said day *after* the service of his answer. Said Cass is positive that these papers were tendered for filing before the expiration of the twenty days and such proffer to the clerk and discovery of defect must therefore have been before the answer was served on the plaintiff's attorney.

The office of the attorney for the defendant then represented two Casualty Insurance Companies and had and now has a large number of actions similar to this and it is natural that said Cass might be mistaken in his recollection.

5. Petitioner does not mean to contend (as Cass intimates in Subdivision 14) that in the State Courts of Record the summons is signed by the clerk, but in the said Courts, while the summons is to be signed by the attorney of Record, it is not necessarily signed by the attorney himself but may be signed by anyone for him and is often simply printed, including the attorney's name.

6. The office of the attorneys for the plaintiff in the Circuit Court action were never advised of the defect in the summons by the clerk or anyone until after the Statute of Limitations had run. This was positively sworn to on the application in the Circuit Court, and the only suggestion to the contrary was the deposition of the deputy clerk who stated that he telephoned somebody. Affidavits were submitted on the motion from everybody connected with the office of plaintiff's attorney of record and with the office of her counsel and also from her attorney and counsel themselves denying that such telephone message had ever been received and denying knowledge of the defect until after the Statute of Limitations had run. The reason the said last mentioned affidavits as to this telephone conversation were made *ex parte* (as claimed in Cass's affidavit, the last of subdivision 16) is that after the statements of the clerk established by these affidavits were made to deponent, deponent requested the attorney for the defendant to reopen the deposition for the purpose of having Cochran's further testimony taken direct, which was refused by defendant's attorney. Said Cochran also re-

fused to make said affidavits personally unless the attorney for defendant would consent, which the attorney for defendant refused to consent to.

It was established on said Circuit Court motion by deponent's affidavit (which was not denied), that defendant gave to the employe who made the mistake, as to the summons the sum of $5.50 for the payment of any fees of the clerk or Marshal, which sum was shown by deponent's check book, and that deponent had no recollection of how much of said sum was returned.

7. The form of summons used in the United States Circuit Court for the Southern District of New York, and in the Courts of Record of the State of New York leaving out the formal parts is as follows:

"To the above named Defendant:

"You are hereby summoned to answer the "complaint in this action and to serve a copy "of your answer on the plaintiff's attorney "within twenty days after the service of this "summons, exclusive of the day of service, and "in case of your failure to appear or answer, "judgment will be taken against you by de- "fault for the relief demanded in the com- "plaint."

This is followed in the United States Courts by the usual attestation in the name of the Chief Justice and the signature of the clerk, which signature is usually not actually made by the clerk, by but the deputy. Deponent at the time of said application in the Circuit Court tried in vain to find the rules of the Circuit Court for the Eastern District of New York and was told by the clerk that the same were not printed except an edition printed about 1865, which deponent was unable to find anywhere, and when deponent requested that he be shown the rules unprinted, he was told that it was too much trouble to the deputy clerk to get them

for him and hence deponent was unable to get them. He was also told by the deputy clerk that these rules were the same as the rules for the Southern District of New York, which Southern District rules contain no requirement for the filing of an answer or notice of appearance.

Deponent, on the 24th day of April, 1905, called again at the office of the Clerk of the Circuit Court of the Eastern District of New York, and again asked about said rules. That after some time said clerk showed to deponent an old typewritten copy of the rules of said Court, stating to deponent that said rules were adopted at the organization of the Court in 1865, and had not since been altered except in one or two respects, which did not effect this motion. That rule 70, as shown in said set of rules is as follows:

> "The following pleadings may be used in all civil actions at law in this Court, namely: the declaration, plea, demurrer and replication, and the provisions made applicable to such or corresponding pleadings by the Revised Statutes of this State so far as the same are not inconsistent with the laws of the United States are adopted as rules applicable to the above mentioned pleadings in the above Court."

Rule 2 says:

> "All notices shall be in writing and shall be served on the attorney in the case."

No claim whatever was made in the application before the Circuit Court that the rules of that Court required filing of a paper. These rules were not alluded to or considered in any way.

8. That counsel for defendant cited on the application to the Circuit Court the case of *Lassen v. Aronson*, 21 *New York Supplement*, 452, as authority for the position that a notice of appearance might be withdrawn if put in under mistake, no matter when the application to withdraw was made. It did not appear in the report of this case when

the application to withdraw was made, but deponent thereupon consulted with the attorney for the plaintiff in said case of Lassen v. Aronson, and said attorney submitted to the Circuit Court an affidavit that the motion to withdraw the notice of appearance was served eight days after the complaint was served and only forty days after the summons was served. The application to withdraw could not have been made until this complaint was served.

9. That Section 421 of the New York Code of Civil Procedure was not contained in the laws of New York until about 1881, but that at the time the aforesaid rules of the Circuit Court were adopted the only statute law on the subject was contained in Section 139 of the old Code: "The voluntary appearance of a defendant is equivalent to personal service of the summons upon him," and up to the adoption of the said Section 421 specifically prescribing the way in which an appearance shall be made the Courts of New York universally held that an appearance might be made by merely subscribing the name of the attorney to papers in the action and not specifying that the appearance was made specially.

10. That deponent, after the finding of the mistake in the summons, proferred the said summons and complaint and said notice of appearance, served on deponent to the clerk of said Court for filing, but said clerk refused to file said papers and repeatedly stated to deponent that he would file no papers in this action, which attitude of the clerk was known to Honorable Edward B. Thomas on the said application in this Court.

RICHARD A. IRVING.

Sworn to before me this
27th day of April, 1905.

WILLIAM C. REDDY,
Notary Public,
N. Y. Co.